

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

January 11, 2007 Session

**BRADLEY BRUCE SCOFIELD v. SHAILA JAN SCOFIELD**

**Appeal from the Chancery Court for Rutherford County**  
**No. 03-6331DR Royce Taylor, Judge**

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**No. M2006-00350-COA-R3-CV - Filed on February 28, 2007**

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This is a post-divorce dispute over custody of the parties' three minor children. In the Final Decree of Divorce, Mother was designated as the primary residential parent. Nineteen months later, the father petitioned to change custody of the children based upon his impending retirement from active duty in the U. S. Army and the mother's multiple post-divorce relocations of her residence and alleged abuse of the children. The trial court dismissed the petition finding the evidence insufficient to constitute a material change in circumstances. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., and J. S. DANIEL, SR. J., joined.

Brad W. Hornsby and Kerry Knox, Murfreesboro, Tennessee, for the appellant, Bradley Bruce Scofield.

Bert W. McCarter, Murfreesboro, Tennessee, for the appellee, Shaila Jan Scofield.

**OPINION**

**I.**

Bradley Bruce Scofield ("Father") and Shaila Jan Scofield ("Mother") were married for seventeen years during which they had three sons. The eldest son, Andrew, was born in 1990; the middle son, Adam, was born in 1993; and the youngest, Alex, was born in 1997.

Father is a career officer with the United States Army. He was deployed to various bases throughout the parties' seventeen-year marriage. In August 2003, when the parties were divorced, the family resided together in Huntsville, Alabama, where Father was deployed at the Redstone

Arsenal.<sup>1</sup> Pursuant to the 2003 Agreed Permanent Parenting Plan, which was incorporated into the Final Decree of Divorce, Mother was designated the primary residential parent of the children. Father received standard visitation and was ordered to pay child support.

Approximately one year after the divorce, Mother announced that she planned to relocate with the children to Murfreesboro, Tennessee, where several of her family members resided. On November 16, 2004, prior to Mother's relocation, the parties entered into a temporary modification of the parenting plan so the parties' eldest son could remain in Huntsville, Alabama in order to finish the current school year at the middle school he was attending. Pursuant to the temporary modification of the plan, the eldest son was to relocate to Murfreesboro, Tennessee to permanently reside with Mother and his two brothers no later than June 30, 2005.<sup>2</sup>

In the spring of 2005, after growing tired of lengthy, temporary deployments over twenty years of service in the U. S. Army, Father decided to retire from the Army so that he could make Huntsville his permanent residence.<sup>3</sup> Concurrent with his decision to retire, he decided to seek custody of all three of the parties' children. Father filed his Petition to Change Custody on March 24, 2005, two years after the divorce. He contended his retirement from the Army, which afforded him a permanent residence, constituted a material change due to the fact he was no longer subject to deployment. Father also contended that Mother's three relocations since the divorce constituted a material change of circumstance.<sup>4</sup> Subsequently, Father additionally contended that conditions in Mother's home constituted an unstable environment and a danger to the children, including what Father characterized as excessive corporal punishment, excessive consumption of alcohol, and numerous guns in the home.

Mother filed an Answer to the Petition denying a material change of circumstance had occurred and contending that it was in the children's best interest that she remain the primary residential parent. Mother additionally filed a Counter-Petition for Contempt. While the competing petitions were pending, Andrew moved to Murfreesboro to live with his mother, step-dad and two brothers.

The trial court conducted an evidentiary hearing concerning both petitions over two days, on August 23 and September 16, 2005. The numerous witnesses who testified included Father, Mother, the parties' two older children, several of the children's teachers, and Detective Mickey McCullough

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<sup>1</sup> Although they lived in Huntsville, Alabama at the time, the parties chose Rutherford County to file for divorce since both parents had substantial family connections to Rutherford County.

<sup>2</sup> After June 30, 2005, the parenting plan would revert back to the terms of the original Permanent Parenting Plan. In the interim, each parent had visitation rights to the children in the primary custody of the other parent.

<sup>3</sup> Father announced his intent to retire after twenty years of service in 2005. The effective date of the retirement was to occur the following year, in December 2006.

<sup>4</sup> Mother moved from Huntsville to Murfreesboro, and while in Murfreesboro, she relocated two more times.

of the Rutherford County Sheriff's Department. At the conclusion of the evidentiary hearing, the trial court found no material change of circumstance and dismissed Father's petition.<sup>5</sup> The trial court also awarded Mother her attorney's fees for defending the petition to modify custody. Father appeals contending the evidence preponderates against the trial court's finding that he failed to prove a material change of circumstance. He also contends the trial court erred by awarding Mother her attorney's fees.

## II.

Although appellate courts are reluctant to second-guess custody decisions when so much depends on the trial court's assessment of the witnesses' credibility, *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001); *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996), we will reverse or modify a trial court's custody decision if we conclude the decision rests on an error of law, or if the evidence preponderates against the finding that there has or has not been a material change in the child's circumstances or that the child's interests will be best served by changing an existing custody arrangement. *Placencia v. Placencia*, 3 S.W.3d 497, 499 (Tenn. Ct. App. 1999); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997); *Steen v. Steen*, 61 S.W.3d 324, 328 (Tenn. Ct. App. 2001).

Our review of a trial court's conclusions on issues of law is *de novo*, with no presumption of correctness. *Kendrick v. Shoemaker*, 90 S.W.3d 566, 569 (Tenn. 2002). A trial court's findings on issues of fact are reviewed *de novo*, accompanied by a presumption of correctness unless the evidence preponderates otherwise. *Id.* at 570; Tenn. R. App. P. 13(d). If the trial court does not make specific findings of fact on an issue, we will review the record to determine where the preponderance of the evidence lies and accord no presumption of correctness to the conclusion of the court below. *Id.*

## III.

A custody decision, once final, is *res judicata* upon the facts in existence or reasonably foreseeable when the decision was made, *Young v. Smith*, 246 S.W.2d 93, 95 (Tenn. 1952); *Long v. Long*, 488 S.W.2d 729, 731-32 (Tenn. Ct. App. 1972); *Steen*, 61 S.W.3d at 327; *Solima*, 7 S.W.3d 30, 32 (Tenn. Ct. App. 1998); however, the circumstances of children and their parents change. Accordingly, our courts are empowered to alter custody arrangements when intervening circumstances require modifications. Tenn. Code Ann. § 36-6-101(a)(1); see *Massengale v. Massengale*, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995).

The statutory scheme that sets forth the framework for modifications in custody or visitation (parenting time) arrangements is set forth in Tenn. Code Ann. § 36-6-101(a)(2). In 2004, subsection (a)(2)(B) was amended, and a new subsection, (a)(2)(C), was added by an Act, the stated purpose

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<sup>5</sup>The trial court also found Father in contempt but that it was not willful. The contempt ruling is not at issue on appeal.

of which was to amend “Title 36, Chapter 6, relative to the review of age appropriate modifications of parenting time and visitation arrangements with the children of parents in child custody orders.” 2004 Tenn. Pub. Acts 759.

The only change to Tenn. Code Ann. § 36-6-101(a)(2)(B) was the deletion of the language “or a residential parenting arrangement” from the first sentence. Prior to the 2004 amendment, the first sentence read: “If the issue before the court is a modification of the court's prior decree pertaining to custody or a residential parenting arrangement, the petitioner must prove by a preponderance of the evidence a material change in circumstance.” As amended, subsection (2)(B) now reads:

**(B) If the issue before the court is a modification of** the court's prior decree pertaining to **custody**, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

Tenn. Code Ann. § 36-6-101(a)(2)(B) (2004)<sup>6</sup> (emphasis added).

An entirely new subsection, which only pertains to modification of residential parenting schedule, as distinguished from custody, reads as follows:

**(C) If the issue before the court is a modification of** the court's prior decree pertaining to **a residential parenting schedule**, then the petitioner must prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that

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<sup>6</sup>Prior to the 2004 amendment, the statute with the now deleted word emphasized in italics read:

(B) If the issue before the court is a modification of the court's prior decree pertaining to custody language *or a residential parenting arrangement*, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

Tenn. Code Ann. § 36-6-101(a)(2)(B) (2003) (emphasis added).

significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.

Tenn. Code Ann. § 36-6-101(a)(2)(C) (2004) (emphasis added).<sup>7</sup>

As a result of the 2004 amendment, Tennessee now has a different set of criteria for determining whether a material change of circumstance has occurred to justify a modification of a “residential parenting schedule” and the specifics of such a schedule. The amendment, specifically the addition of subsection (a)(2)(C), establishes different criteria and a lower threshold for modification of a residential parenting schedule. *See Rose v. Lashlee*, No. M2005-00361-COA-R3-CV, 2006 WL 2390980, at \*2, n.3 (Tenn. Ct. App. Aug. 18, 2006) (holding that Tenn. Code Ann. § 36-6-101(a)(2)(C) “sets a very low threshold for establishing a material change of circumstances”). However, the statutory criteria pertaining to a modification of “custody” – the term used in the statute, which we equate to the designation of “primary residential parent” and matters more substantive than a change of schedule – remain unchanged. *See* Tenn. Code Ann. § 36-6-101(a)(2)(B).

In the matter at issue, Father seeks to remove the children from Mother’s custody in Murfreesboro, Tennessee, to have the children reside primarily with Father in Huntsville, Alabama, and to have Father designated as the primary residential parent. We are, therefore, presented with a request to modify custody and the designation of the primary residential parent. Accordingly, we will evaluate Father’s petition based upon the criteria under Tenn. Code Ann. § 36-6-101(a)(2)(B) and related decisions.

#### IV.

Courts may modify an existing custody arrangement when required by unanticipated facts or subsequently emerging conditions. *Adelsperger*, 970 S.W.2d at 485. There are no bright line rules

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<sup>7</sup> It should be noted that subsection (C) includes a listing of circumstances that may constitute a material change of circumstance that are not found in subsection (B). The added circumstances that appears in subsection (C) that do not appear in (B) is set out in *italics* below.

If the issue before the court is a modification of the court's prior decree pertaining to *a residential parenting schedule*, then the petitioner must prove by a preponderance of the evidence a material change of circumstance *affecting the child's best interest*. A material change of circumstance does not require a showing of a substantial risk of harm to the child. *A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.*

Tenn. Code Ann. § 36-6-101(a)(2)(C) (2004) (emphasis added).

for determining when a change of circumstances should be deemed material enough to warrant changing an existing custody arrangement. *Keisling v. Keisling*, 196 S.W.3d 703, 718 (Tenn. Ct. App. 2005); *Solima*, 7 S.W.3d at 32. Decisions turn on the facts of each case. As a general matter, however, the following principles apply. One, the petitioner must prove by a preponderance of the evidence a material change in circumstance. Tenn. Code Ann. § 36-6-101(a)(2)(B). Two, the changed circumstance must have arisen after the entry of the custody order sought to be modified. *Turner v. Turner*, 776 S.W.2d 88, 89-90 (Tenn. Ct. App. 1988). Three, the changed circumstance must not have been reasonably anticipated when the custody decree under attack was entered. *Adelsperger*, 970 S.W.2d at 485. Four, the circumstance must affect the child's well-being in some material way. *Hoalcraft v. Smithson*, 19 S.W.3d 822, 829 (Tenn. Ct. App. 1999); *Dalton v. Dalton*, 858 S.W.2d 324, 326 (Tenn. Ct. App. 1993).

Father, as the petitioner seeking to change custody, has the burden of proof, *Steen*, 61 S.W.3d at 327 (citing *Adelsperger*, 970 S.W.2d at 485), and if he fails to carry his burden of proof, the trial court should dismiss the petition. *See Hoalcraft*, 19 S.W.3d at 828.

Father's petition hinges on two categories of alleged changes in circumstances. One pertains to a change in Father's life, that being his retirement from the Army which affords him a permanent residence. The other pertains to alleged changes in Mother's life and household. They include her three relocations since the divorce and conditions in Mother's home which Father contends constitute an unstable environment and a danger to the children. We will examine them in turn.

#### A.

The trial court found the change in Father's deployment status and his impending retirement, which afforded Father a permanent residence, constituted a change in Father's life but it did not affect the children's well-being in a meaningful way. We agree with the trial court.

In *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002), the Court applied the foregoing principles to conclude that a party presents a change of material circumstance by showing: "the change has occurred after the entry of the order sought to be modified and the change is not one that was known or reasonably anticipated when the order was entered," *Blair*, 77 S.W.3d at 150 (citing *Smith v. Haase*, 521 S.W.2d 49, 50 (Tenn. 1975)), and the change of circumstances is one "that affects the child's well-being in a meaningful way." *Blair*, 77 S.W.3d at 150 (quoting *Hoalcraft*, 19 S.W.3d at 829). Here, Father asserts a change in his residential situation, whereby he can now permanently reside in Huntsville. Our Supreme Court, however, has found that a move and improvement in one parent's residence, without more, does not constitute a material change of circumstances. *Blair*, 77 S.W.3d at 150-51. The mere fact a parent settles down and plans to remain in one location does not necessarily affect the child's well-being in a meaningful way. There must be more – meaning proof the change in the parent's life will have a substantial effect on the child's well-being. *Blair*, 77 S.W.3d at 150-51; *Solima*, 7 S.W.3d at 32.

Having reviewed the record, we have concluded the evidence does not preponderate against the trial court's finding that the change in Father's deployment status was insufficient to establish a change of circumstances that affects the children's well-being in a meaningful way.

B.

The trial court found that Father failed to present sufficient evidence to substantiate his allegations that Mother's three post-divorce relocations and the environment in Mother's home had a substantial adverse effect on the children's well-being. Father contends the evidence preponderates against the trial court's findings.

Father asserts that the following circumstances constituted material changes: a decline in the children's grades, alcohol in the home, abusive corporal punishment, and guns in the home. It is undisputed the children's grades declined. It is also undisputed that Mother and her new husband consumed alcohol in the home, that Mother exercised corporal punishment when she believed a child had misbehaved, and that guns and ammunition were in the home. What is disputed is the effect these circumstances have on the children.

Father contends that Mother's acts and omissions, including the relocation of her residence three times since the divorce, each time to a less desirable community, indicated that she had become less stable as a parent since the divorce, which circumstance, he alleges, contributed to a decline in the children's grades. Father however failed to present sufficient evidence to support his contentions, and Mother refuted his contentions by calling as witnesses several of the children's teachers in Murfreesboro, each of whom stated many positive things about Mother's role in her children's education.

Sue Copeland, Alex's second grade teacher at Reeves Rogers Elementary School, testified that Mother did everything she could to help Alex get additional academic help in reading and assistance with his speech. Ms. Copeland further testified that she had great communication with Mother, talking with her three to four days a week. According to Ms. Copeland, Mother had both Alex's general best interests and best interests from an educational standpoint at heart.

Another of Alex's teachers, Lynn Douglas, remarked of Mother, "[S]he's a parent that every teacher loves. She's concerned about her child. She wants her child to do the best that they can. She comes in and says, 'What can I do to help them at home to achieve more?'"

Steve Nagy, Adam's teacher at Reeves Rogers Elementary, testified that Mother was "very supportive of everything that we were doing at the school. . . ." Mr. Nagy further testified that he believed Mother was genuinely concerned about Adam's grades.

Although the children's grades declined, that alone is insufficient to constitute a material change of circumstance or to conclude that it is Mother's fault. Other factors, such as a more rigorous curriculum or a desire to fail in order to return to Huntsville, could be material.

Father primarily relied on the testimony of his two oldest sons, who were fifteen<sup>8</sup> and twelve years of age, respectively, at the time of the hearing, to substantiate the allegations concerning the consumption of alcohol in the home and corporal punishment, which he alleges was excessive and dangerous. The trial court, however, found the evidence insufficient to substantiate Father's claims. Although the trial court did not make an express finding of credibility, it is obvious from its ruling from the bench and the Order of Dismissal that the trial court gave little credence to the children's testimony due to their admitted bias and expressed desire to return to Huntsville, Alabama to be with their friends. This evidentiary circumstance is critical to the outcome of this case because the children's testimony was Father's primary evidence.

At the hearing, Andrew admitted he was doing everything in his power to help his father's case with the end goal being that he would primarily reside with his father in Huntsville. The transcript of an exchange between Andrew and Mother's attorney is as follows:

Q: How did you know to take pictures [of guns, alcohol, and the effects of corporal punishment on your brother]?

A: Because when I had to go up there, I was just trying to do whatever I could to get back with my dad because I don't – I really don't want to live with my mom.

Q: So you're doing everything you can to help your dad's case out?

A: I'm doing everything I can to help myself get back to Huntsville.

Speaking from the bench, the trial court assessed Andrew's testimony as follows:

Clearly, [Andrew] very much wants to stay in Alabama. . . . And, certainly, it would be a good situation for the child to live there if the circumstances have changed significantly to allow him to do that. But we get into a real mess when we start litigating these matters, especially when we have teenagers involved who push the limits as it is. And I think it's clear that this child is pushing the limits. . . .

The appellate courts have long held that the trial court is in the best position to evaluate the credibility of a witness because it has the ability to personally hear the witness and view his or her demeanor, unlike an appellate court. *Union Planters Nat'l Bank v. Island Mgmt. Auth.*, 43 S.W.3d 498, 502 (Tenn. Ct. App. 2000). It is for this reason we defer to the trial court's assessment of the witness's credibility.

In addition to the above findings, the trial court made other significant findings of fact. One of those findings pertained to corporal punishment, and the other pertained to the presence of guns in the home. Those findings, which are stated in the trial court's Order of Dismissal, read as follows:

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<sup>8</sup> Andrew, the eldest, was fourteen on the first day of the hearing and turned 15 prior to the last day.



6. Pursuant to Tenn. Code Ann. § 37-1-403 regarding abuse, the Court finds that the allegations were clearly corporal punishment and does not rise to the level of abuse. Further, the Court finds that corporal punishment is a regular form of punishment used by most parents as long as it does not rise to the level of an abusive situation. A pop on the bottom leaving a red mark does not rise to the level of abuse, nor does a pop with a wooden spoon or paint stirrer rise to abuse. The Court does not find that this situation is a change of circumstances and in most cases is appropriate.

. . . .

8. It was indicated that a couple of guns were available to the children. One gun had a lock on it and one did not have a bolt in it. Another gun was found and the Court assumes it was loaded and bullets were available. But, again that gun was hidden under a mattress and the oldest child had to search for it to find it to take a picture of it to come to Court. The Court does not find this to be an abusive situation not does it find a change in circumstances to change the child's residential arrangements.

Having considered all of the evidence in the record, we have concluded the evidence does not preponderate against the trial court's findings that the proof presented by Father was insufficient to establish that a material change of circumstance that had a substantial adverse effect on the children had occurred.

## V.

The trial court awarded Mother \$8,500 in attorney fees for defending the petition. Father contends the trial court erred by awarding Mother any of her fees, and alternatively by awarding her the amount of \$8,500.

Fees are awarded in child custody cases to protect the child's interests. *Sherrod v. Wix*, 849 S.W.2d 780, 784 (Tenn. Ct. App. 1992). "[R]equiring parents who precipitate custody . . . proceedings to underwrite the costs if their claims are ultimately found to be unwarranted is appropriate as a matter of policy." *Id.* at 785. The basis of such award is found in Tenn. Code Ann. § 36-5-103(c).

The plaintiff spouse may recover from the defendant spouse, and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court."

Tenn. Code Ann. § 36-5-103(c). Whether to award attorney's fees a party incurred in enforcing any decree in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child of the parties lies within the discretion of the trial court. *Eldridge v. Eldridge*, 137 S.W.3d 1, 25 (Tenn. Ct. App. 2002); *Killingsworth v. Ted Russell Ford, Inc.*, 104 S.W.3d 530, 534 (Tenn. Ct. App. 2002). Whether to award attorney's fees in such matters is well within the discretion of the trial court, *Kesterson v. Varner*, 172 S.W.3d 556, 573 (Tenn. Ct. App. 2005), which decision will be upheld on appeal unless the trial court abused its discretion. *Eldridge*, 137 S.W.3d at 25; *Killingsworth*, 104 S.W.3d at 534. A court abuses its discretion when it "either applie[s] an incorrect legal standard or reache[s] a clearly unreasonable decision, thereby causing an injustice to the aggrieved party." *Kline v. Eyrich*, 69 S.W.3d 197, 204 (Tenn. 2002).

Here, the trial court specifically found, "While I realize Colonel Scofield has good intentions and the child certainly wants to live with him, I don't think that it was appropriate to bring this action." The court further stated that the proceedings caused "great difficulty" to Mother.<sup>9</sup> We, therefore, find no error in the trial court's decision to award Mother her attorney's fees for successfully defending the petition.

In the alternative, Father contends the amount of attorney's fees awarded was excessive and unsubstantiated. After reviewing the fee application, we find the trial court reduced the requested fee by \$1,000, and find no evidence or legal principle upon which to conclude that the trial court abused its discretion in setting the amount of the fee. We therefore affirm the award of attorney's fees in the amount of \$8,500.

Mother has additionally requested attorney's fees incurred on appeal. She successfully defended the petition in the trial court and in this court as well. Accordingly, we find she is entitled to attorney's fees on appeal under Tenn. Code Ann. § 36-5-103(c), *Toms v. Toms*, 98 S.W.3d 140, 145 (Tenn. 2003); *D. v. K.*, 917 S.W.2d 682, 686 (Tenn. Ct. App. 1995), and remand the issue to the trial court to set the amount of the fee.

## VI.

The judgment of the trial court is affirmed, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against Appellant, Bradley Bruce Scofield.

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FRANK G. CLEMENT, JR., JUDGE

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<sup>9</sup>The record reveals that her income, when combined with her new husband, is approximately \$24,000 a year.